PROVINCE OF LOWER-CANADA;

Court of Appeals,

JULY SESSION, 1819.

JAMES KERR, Esquire,
Appellant,

and

JOSEPH HUBERT LACROIX,
Esquire,
Respondent.

Appellant's Case.

A. STUART, *of Counsel for Appellant.*

PROVINCE OF LOWER-CANADA,

Court of Appeals,

JULY SESSION, 1819.

PROVINCE OF LOWER-CANADA.

COURT OF APPEALS.

IN A CAUSE Between

JAMES KERR, Esquire,

(In the Court below)

APPELLANT.

and

JOSEPH HUBERT LA CROIX, Esquire,

Lagatee Universel of his Mother MARIE DE LA CROIX, deceased,

(Defendant in the Court below)

RESPONDENT.

THE APPELLANT'S CASE.

THIS action was brought against the Respondent, as *Legatee Universel* of widow La Croix, for damages occasioned by his late mother in falsely representing herself and the heirs of her late husband to be seigniors and proprietors of a certain fief called Villeray, and thereby inducing the Appellant to purchase from her an assignment of certain arrears of *lods et ventes*, pretended to be due by one John Fraser.

The special defence set up was, *first*, that the Respondent was not *Legatee Universel* of his mother; and *secondly*, that the debt being assigned as an *uncertain* demand, the Appellant then being an Advocate, it was a *droit litigeux*, and no action could be maintained against the Respondent.

But the Court in an early stage of the suit dismissed these exceptions.

It appears in evidence that in September, 1796, Mr. John Fraser had claims as *bailleur de fonds* of two wharves on the proprietors of the land. for a sum exceeding £3000, and there being various sums of money also due on the wharves to the Seignior for *lods et ventes*, the proprietors refused to pay their debts to Mr. Fraser, until he could produce an acquittance for the *droits seigneuriaux*. The Plaintiff, then a Barrister at Quebec, being consulted by Mr. Burns, the Agent of Mr. Fraser, of London, as to proper means to recover that large sum, and finding that by a Deed of Concession a piece of Land, near Quebec had been granted in the year 1663, to be holden *en fief* by the name of Villeray, that in the year 1793 the widow and heirs had been collocated by a judgment of the Common Pleas, as Seigniors of that fief for *lods et ventes*, and that Mr. Fraser as well as the then proprietors of these wharves held them under titles granted in 1772 and 1783, by the widow and heirs as Seigneurs primitifs; he entertained no doubt of the widow La Croix and her children being the persons who were alone entitled to these arrears of *lods et ventes*, and he recommended to Mr. Burns that he should obtain the acquittance of that Lady, as the best means to enable him to enforce the payment of the money so due to Mr. Fraser. Mr. Burns, not thinking himself authorised to advance money for Mr. Fraser, and the Appellant purposing to go to England in the autumn of 1796, asked and obtained Mr. Burns's permission to obtain an assignment of all claims of *lods et ventes* due by Mr. Fraser to the widow and heirs La Croix on these wharves.

Neither the deed of assignment itself (dated the 30th September, 1796) nor any conversation with the widow La Croix or any other person could lead the Appellant to conceive that he purchased a *doubtful or uncertain* debt.

On the Appellants interview with Mr. Fraser, in the beginning of year 1797, and *not before*, he found doubts entertained by that Gentleman as to the existence of the Fief Villeray, and that he refused to refund him the money he had advanced on any terms. All that he could obtain was a reference back to Mr. Burns, who, on the Appellant's return to Canada the year

following, shewed no disposition to make any arrangement by which the Appellant might be relieved. At length finding that Mr. Burns preferred giving the Proprietors a deduction of £600 from the amount of their debts, under condition that they should pay the balance, and take all risks on themselves, to the course pointed out by the Titles, and that he had absolutely concluded an agreement with them to that effect; the Appellant had no alternative left to him but instituting an Action against Mr. Fraser, or giving up the money he had laid out for that Gentleman, and of further paying the £60 for which he had granted an unconditional Note. As to an application which he made to the widow and Heirs to refund his money and to cancel his Note, it is obvious that it was not attended with success. The Action was brought in June, 1801, for the *Lods et Ventes* on one of the wharves, and in this Action the Attorney General intervened, claiming the *Lods et Ventes* as accruing within the Censive of the Crown; the widow and Heirs La Croix were called into the cause, and after hearing the parties on the evidence, the widow and Heirs were declared to hold *enfief* as Seigneurs of Villeray, and the Court rendered a Judgment against Mr. Fraser for £500 sterling, being the sum due by him on one of the wharves. These Judgments, and particularly the artful Letter written to the Appellant, by Mr. Paul La Croix, (the Respondent's Brother and Agent) induced the Appellant to hope that on his bringing another Action for the *Lods et Venies* due on the other wharf, Mr. Fraser would have seen the propriety of entering into an amicable settlement with the Appellant; but in this expectation he was deceived, for Mr. Fraser having dispossessed himself of all his funds in this Country, he was quite indifferent to the issue of the suits in Canada. The Action was brought against him for arrears on the other wharf, and in this also the Appellant obtained a Judgment for the *Lods et Ventes*, in which Judgment the Widow and Heirs were again recognised to be *Seigneurs Primitifs* of the fief Villeray. After having been involved into so much expense, and finding that Mr. Fraser's property was without the Jurisdiction of the Courts of this Province, the Appellant had no means left to recover his money than to transmit copies of these Judgments to an Agent in London, with instructions to bring an Action of Debt in the Court of King's Bench, at Westminster. So soon as this latter proceeding took place, Mr. Fraser wrote to his Agent here, that he had no prospect of getting rid of the suit in England, but by instituting an Appeal from the Judgment in the first Action, to His Majesty in Council; and from the latter to this Honorable Court; and his wishes in this respect were immediately complied with. During the pendency of these Actions, the wharf, for the *Lods et Ventes* on which the first Action was brought, was Sold by *Decré forcé* at the suit of one Jacobs against Mr. Brehaut, and it became necessary for the Appellant and the Widow and Heirs La Croix to fyle Oppositions to preserve their respective rights. The Crown, by the Attorney General, fyled a Cross-Opposition, and for a second time called in question the rights of the Widow and Heirs to hold as *Seigneurs Primitifs* of the wharf; and this new contestation was promoted and encouraged by an Act, passed on the 8th April 1801, which permitted Commissioners to accept of compositions for arrears of *Lods et Ventes* due by *Censitaires* of the Crown: for the Proprietors of these wharves hoped, what they ultimately realized, to obtain an acquittance for a trifle, provided they could succeed in proving that this property was in the Censive of the Crown. Thus stimulated, the claims of the Widow and Heirs came to be opposed with a degree of animation hitherto unknown; written evidence was produced which threw a new light on the titles to these wharves; and the Widow and Heirs, intimidated with the proceedings had by their Attorney, Paul La Croix, withdrew their Opposition and renounced their claim and the Appellant's Cause. The assistance of the Widow and Heirs being thus withdrawn from the Appellant, the Judgment of the 20th June, 1809, followed, as a matter of course, in which the wharf was declared finally to be within the Censive of His Majesty and the Crown, collocated for £150, (the sum for which Mr. Brehaut had been permitted to compound with the Commissioners) instead of a much larger amount.

These are the facts of this Case, which are almost entirely proved by the written and parol testimony in the Cause. And after such a full disclosure it is difficult to conceive on what grounds of fact or of law the Court at Montreal could have rendered the Judgment of the 19th October, 1815, now complained of. If the minds of the Judges were struck with the fact of the multiplicity of suits to which this Assignment gave rise, they might have seen that these arose *entirely* by the fault of the Widow and Heirs of La Croix, in claiming that as their property which did not belong to them, and have been *exclusively* the misfortune of the Appellant. One circumstance is striking—It was with no small share of reluctance the Appellant resorted to a Court of Law. He waited five years before he brought his Action, and only followed up by the advice of the La Croix's that success which attended the commencement of the suit. Nor ought it to be forgotten that in the first instance he purchased only those arrears which were due by Mr. Fraser on the 21st October, 1788, and not those which had become due on the 30th September, 1796, eight years afterwards. At that period it was no debt *litigieux*, and so thought Mr. Fraser, for in the Actions brought against him no such defence was set up. It was left for Mr. Hubert La Croix, the Respondent, first to injure the Appellant by taking a sum of money under a false representation, and then to attempt to turn the odium from himself by holding him out as the purchaser of litigated rights, a "Mover of pleas and suits."

It will be distinctly seen from the evidence of Messrs. Brehaut, Panet, and Voyer, that the Widow and Heirs, long before the year 1796 held themselves out as *Seigneurs Primitifs* of the Fief Villeray. Indeed the titles of the wharves in 1772, and 1783, place this beyond a question: and the transport itself shews that at the time of the purchase of these arrears of *Lods et Ventes*, the Widow obstinately persisted in this assumed character. Where, it may be asked, is there any thing in the transaction to indicate that the Widow La Croix *sold*, or that the appellant bought this debt as *douteux et incertain?*

583, 584, 585 586, and 587.

Pothier, in his *Traité du Contrat de Vente*, lays down an unerring touchstone by which the transport may be known to be an assignment of a *Droit Litigieux*.—First, It must be sold as a debt *douteuse et incertain*; and secondly, There must be a covenant that the *vendeur* does not warrant the debt, *et que l'acheteur la fasse valoir à ses risques et à ses frais*. This sale and transfer here has no distinguishing character from any ordinary assignment. It is true there is not to be found in the Deed any express clause by which the debt is warranted; but inasmuch as there is an implied covenant in Law "*que la créance qu'il vend existe, et lui appartient*;" such a clause was quite unnecessary. Here the debt not only is declared by the Heirs of La Croix, by their Agent Paul La Croix, as well as by the Judgment of the 20th June, 1809, *not* to have existed, and that it did not belong to the Widow and Heirs. The *mala fides* of the Respondent in making a formal renunciation of his rights, at the time when the Court were called upon to decide the question, as to the existence of the Fief, after an expence of above One Thousand Pounds, incurred through the false declarations of the Widow and Heirs, brings the Respondent within the 587th paragraph of Pothier's *Contrat de Vente*, and shews most clearly "*qu'il a commis un vol en vendant une prétension qu'il savoit mauvaise*;" And against such a fraud, it may be asked, where is the Law by which it is declared that a *Procureur* or *Avocat* shall not be protected?

Quebec, 20*th July*, 1819.